

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	Civil No: 00C 1687
Plaintiff,)	
)	
v.)	Judge Bucklo
)	
EARTHGRAINS BAKING COMPANIES,)	
INC.)	
)	Filed: September 10, 2002
Defendant.)	

**MOTION OF THE UNITED STATES OF AMERICA FOR AN ORDER
DIRECTING DEFENDANT EARTHGRAINS BAKING COMPANIES, INC. TO
SHOW CAUSE WHY IT SHOULD NOT BE HELD IN CIVIL CONTEMPT OF COURT**

The United States of America, by its attorneys acting under the direction of the Attorney General, respectfully moves for an Order to Show Cause Why Earthgrains Baking Companies, Inc. ("Earthgrains") should not be found in contempt of the Hold Separate Stipulation and Order entered by this Court on March 20, 2000, and in contempt of the Final Judgment entered by this Court on July 3, 2000. In support of this motion, the United States of America states:

I. JURISDICTION AND VENUE OF THE COURT

1. This Motion alleges violations of the Hold Separate Stipulation and Order and the Final Judgment by Earthgrains. The Court has jurisdiction over Earthgrains under its inherent power to enforce compliance with its orders pursuant to 18 U.S.C. § 401(3), N.D. Ill. L. R. 37.1, and under Sections II, VIII, XI, and XII of the Final Judgment.

2. Section VIII of the Final Judgment provides:

Until the divestitures required by the Final Judgment have been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the sale of any Relevant Baking Asset.

3. Section XI of the Final Judgment provides:

Jurisdiction is retained by the Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

4. Section XII of the Final Judgment provides:

Unless this Court grants an extension, this Final Judgment will expire upon the tenth anniversary of the date of its entry.

II. THE DEFENDANT

5. At the time the acts alleged in this Motion occurred, Earthgrains was a Delaware corporation headquartered in St. Louis, Missouri.

III. PROCEDURAL BACKGROUND

6. On March 20, 2000, the United States filed suit against Earthgrains under Section 7 of the Clayton Act, 15 U.S.C. § 18, to prevent its acquisition of Metz Holdings, Inc. ("Metz"). The Complaint alleged that the proposed merger between Earthgrains and Metz would substantially reduce competition in the sale of white pan bread in numerous local markets throughout Iowa, Illinois, Kansas, Missouri, and Nebraska, the largest of which are the metropolitan Omaha, NE, Kansas City, MO, and Des Moines, IA areas. The Complaint is attached as Attachment A.

7. On March 20, 2000, contemporaneous with the filing of the Complaint, the United States filed a proposed Final Judgment in settlement of the allegations in the Complaint. The proposed

Final Judgment required Earthgrains to divest certain enumerated assets, collectively referred to as the "Relevant Baking Assets" in the "Relevant Territory." The "Relevant Baking Assets" included *Colonial* white pan bread and the Des Moines bakery. The "Relevant Territory" included each of the local markets of Omaha, NE, Kansas City, MO, and Des Moines, IA. After allowing for a period of public comment under the Tunney Act, 15 U.S.C. § 16, the Court entered the Final Judgment on July 3, 2000. The Final Judgment is attached hereto as Attachment B.

8. Simultaneous with the filing of the Complaint on March 20, 2000, the Court entered a Hold Separate Stipulation and Order. The Hold Separate Stipulation and Order required Earthgrains to maintain the Relevant Baking Assets as "independent, economically viable, and ongoing business concerns," prior to the divestitures ordered to be made in the Final Judgment. The Hold Separate Stipulation and Order is attached hereto as Attachment C.

9. On October 6, 2000, Earthgrains completed the divestitures required by the Final Judgment.

IV. CONDUCT ORDERED IN PROVISIONS OF THE HOLD SEPARATE STIPULATION AND ORDER

10. Section V(I) of the Hold Separate Stipulation and Order required that Earthgrains not transfer, terminate, or otherwise alter the salary or employment agreements for any Earthgrains employee who worked in Earthgrains's Des Moines, IA bakery. This section provides:

Except in the ordinary course of business or as is otherwise consistent with this Hold Separate Stipulation and Order, defendants shall not hire, transfer, terminate, or otherwise alter the salary or employment agreements for any Earthgrains, Metz, or Specialty Foods employee who, on the date of defendants' signing of the Hold Separate Stipulation and Order, either: (1) works in Earthgrains's Des Moines, IA bakery or in the production, distribution or sale of bread, buns or rolls under a Relevant Baking Asset or

(2) is a member of management referenced in Section V(J) of this Hold Separate Stipulation and Order.

11. Sections V(D) and V(F) of the Hold Separate Stipulation and Order required that Earthgrains take all steps necessary to ensure that its Des Moines, IA bakery was maintained and operated as an independent, ongoing, economically viable business concern and was fully maintained in operable condition at no less than its current capacity and sales. Section V(D) provides:

Earthgrains shall take all steps necessary to ensure that its Des Moines, IA bakery will be maintained and operated as an independent, ongoing, economically viable business concern.

Section V(F) provides:

Earthgrains shall take all steps necessary to ensure that its Des Moines, IA bakery is fully maintained in operable condition at no less than its current capacity and sales, and shall maintain and adhere to normal repair and maintenance schedules for the Relevant Baking Assets.

12. Section V(C) of the Hold Separate Stipulation and Order required that Earthgrains maintain all promotional, advertising, sales, technical assistance, marketing and merchandising support for the Relevant Baking Assets in the Relevant Territory. This section provides:

Defendants shall use all reasonable efforts to maintain and increase the sales and revenues of the products produced by or sold under Relevant Baking Assets, and shall maintain at 1999 or previously approved levels for 2000, whichever are higher, all promotional, advertising, sales, technical assistance, marketing and merchandising support for the Relevant Baking Assets and otherwise maintain the Relevant Baking Assets as active competitors in the Relevant Territory.

V. ACTS IN VIOLATION OF THE HOLD SEPARATE STIPULATION AND ORDER

13. In 1999 *Colonial* white pan bread appeared on Earthgrains's Promotional Calendar in Omaha, NE from July 10 through October 6. Despite the Court's requirement to maintain

promotions at or above 1999 levels, shortly after entry of the Final Judgment and prior to divesting the Relevant Baking Assets, on July 10, 2000, Earthgrains removed *Colonial* white pan bread from its Promotional Calendar in Omaha, NE. Earthgrains never again promoted *Colonial* white pan bread on its Omaha, NE Promotional Calendar.

14. Similarly, Earthgrains also ignored the Court's order when, prior to divesting the Relevant Baking Assets, it removed *Colonial* white pan bread from its Promotional Calendar in Des Moines, IA on July 24, 2000. *Colonial* white pan bread never again appeared on Earthgrains's Promotional Calendar in Des Moines, IA. As was the case in Omaha, NE, Earthgrains's actions contrast starkly with its promotional practices in 1999, when *Colonial* white pan bread was on Earthgrains's Promotional Calendar in Des Moines, IA from July 24 through October 6.

15. During the period from August 22, 2000, through September 22, 2000, Earthgrains transferred at least eight employees from its Des Moines, IA bakery to other Earthgrains bakeries, including facilities in Fort Payne, AL, Nashville, TN, Sacramento, CA, Oakland, CA, Stockton, CA, and Fresno, CA.

16. On September 8, 2000, Earthgrains closed the Des Moines, IA bakery.

VI. VIOLATIONS ALLEGED

17. The allegations contained in Paragraphs 1 through 16 hereof are repeated and realleged as though fully set forth herein.

18. Earthgrains transferred employees who worked in Earthgrains's Des Moines, IA bakery to other bakeries in violation of Section V(I) of the Hold Separate Stipulation and Order.

19. Earthgrains failed to take all steps necessary to ensure that its Des Moines, IA bakery was

maintained and operated as an independent, ongoing, economically viable business concern and was fully maintained in operable condition at no less than its current capacity and sales in violation of Section V(D) and Section V(F) of the Hold Separate Stipulation and Order.

20. Earthgrains failed to maintain all promotional, advertising, sales, technical assistance, marketing and merchandising support for the Relevant Baking Assets in the Relevant Territory in violation of Section V(C) of the Hold Separate Stipulation and Order.

VII. PRAYER

WHEREFORE, The United States moves this Court to issue an Order directing Earthgrains Baking Companies, Inc., to appear before this Court at a time and place to be fixed in said Order, to show cause why it should not be adjudged in civil contempt of this Court; and

THEREAFTER, issue an Order adjudging Earthgrains Baking Companies, Inc. in civil contempt of this Court's Hold Separate Stipulation and Order and Final Judgment, and further:

1. Order Earthgrains Baking Companies, Inc. to pay \$100,000.00 or an amount deemed appropriate by this Court, for contempt of this Court's Hold Separate Stipulation and Order and Final Judgment; and

2. Grant to the United States the costs of this action.

Dated: September 10, 2002

Respectfully submitted,

_____/s/_____

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